IN THE DAVIDSON COUNTY CHANCERY COURT, IN NASHVILLE, TENNESSEE

SENTINEL TRUST COMPANY, and its Directors, Danny N. Bates, Clifton T. Bates, Howard H. Cochran, Bradley S. Lancaster, and Gary L. O'Brien *Petitioners*

v.

KEVIN P. LAVENDER, Commissioner
Tennessee Department of Financial Institutions

Respondent

No. 04-1934-T

Petition for Writ of *Certiorari* and for subsequent Writ of *Supersedeas*

Petitioner, Sentinel Trust Company, a Tennessee corporation authorized to engage in business as a Trust Company, and not authorized or ever authorized to engage in the banking business, with the members of its Board of Directors (as to certain orders), hereinafter collectively referred to as Sentinal Trust Company or similar name where reference to multiple petitioners is appropriate, and petition the Court to issue the writ of *Certiorari* and, after notice and hearing, the writ of *Supersedeas,* against the Respondent Tennessee Commissioner of Financial Institutions (sometimes referred to herein as the "Respondent" or the "Commissioner"), this petition being supported by affidavits identified below as "Attachments" and by exhibits, some of which, as self-identified, are printed from the web site of the Tennessee Department of Financial Institutions (referenced *infra,* ¶ 7).

The writ of *certiorari* sought is the common law writ under T.C.A. § 27-8-101, or if inappropriate, under T.C.A. §§ 27-8-102, *et seq.*, or T.C.A. §§ 27-9-101, *et seq.*, to remove to this Court orders issued by Respondent which the law purports to authorize him to issue only against

banks, and not against trust companies, on the basis of the following allegations.

1. The various charges and orders made by Respondent Commissioner, on the basis only of statutory authority to make such charges and orders in relation to banks, as distinguished from trust companies, are:

(a) The May 3, 2004 Notice of Charges and Opportunity for Subsequent Hearing which the Respondent Commissioner made both against Petitioner Company and the individual petitioners, its directors, a copy of which is attached as **Exhibit A.**

(b) The May 3, 2004 Emergency Cease and Desist Order, which the Respondent Commissioner made both against Petitioner Company and the individual petitioners, its directors, purportedly pursuant to his statutory to make such orders against banks (and against no other types of institutions), ordering them to cease certain activities, but affirmatively ordering that $2 million addition capital be injected into the corporation by May 17, 2004, a copy of which is attached as **Exhibit B.**

(c) The May 18, 2004 Notice of Possession of Sentinel Trust Company, a copy of which is attached as **Exhibit C,** purportedly pursuant to his statutory to make such orders against banks (and against no other types of institutions), which he had served by personnel of the Tennessee Department of Financial Institutions supported by armed law enforcement officers, by which the officers and employees of Petitioner Company were ousted from possession and control of its offices in Hohenwald, Tennessee, and in Nashville, Tennessee.

(d) The May 18, 2004 Order Appointing Receiver, a copy of which is attached hereto as **Exhibit D,** and all related published notices.

(e) The June 18, 2004 Notice of Liquidation of Sentinel Trust Company, a copy of which is attached hereto as **Exhibit E**, and all related published notices.

(f) The June 3, 2004 Request For Administrative Judge to Hear a Contested Case, a copy of which is attached hereto as **Exhibit F.**

2. As alleged above, and as set out in greater detail below, trust companies (including Petitioner) which were not banks, doing business in Tennessee under their corporate charter provisions before March 26, 1980, were not under any regulatory authority of the Tennessee Department of Financial Institutions (or previously, its Superintendent of Banks, within the former Tennessee Department of Insurance and Banking) until enactment of the amendatory Chapter 112, Public Acts of 1999; the amendments there did not amend any identified prior Public Act, but amended parts of the Tennessee Code, as codified. Such Act subjected such companies to the jurisdiction of the Commissioner of Financial Institutions in certain limited respects but did not

attempt to amend prior statutory grants of certain listed powers over banks to grant him the same or even similar powers over trust companies which are not banks.

3. As a matter of law, the banking business has always been characterized by the business of accepting deposits, usually against which checks can be drawn, with "deposit," as previously and still recognized by statute, T.C.A. § 45-3-103(9), defined as "a deposit of money, bonds or other things of value, creating a debtor-creditor relationship." The recognition of the depositor-bank relation as a debtor-creditor relation rather than a fiduciary relation enables each bank, as a debtor, to invest its "borrowed" money at as high a rate as it may obtain, while compensating the depositor-creditor at a much lower rate acceptable to such depositor, without the bank being obligated to share its profits with its depositor-creditor. Every such bank holds deposits subject to each account-owner's right to demand and receive withdrawal of his entire "deposit" on any banking day, so as to require that every such bank have cash reserves in a percentage of such withdrawable demand deposits to assure that it can honor all such withdrawal demands, to guard against the event of a loss of public confidence in any such bank leading to a so-called "run" on the bank. Such reserve maintenance is not only prudent, but is absolutely required by Federal statutory law which, in the event of any conflict with any state law or constructions thereof, invalidates all such state law under the Supremacy Clause of the Constitution of the United States (U.S. Const., Art. VI, ¶ 2). Virtually all banks, state as well as federal, are federally insured under and subject to reserve requirements imposed by the Federal Deposit Insurance Act, with the Federal Reserve Act requiring by 12 U.S.C. § 461(b)(2) a reserve of 3% on its transaction accounts of $25,000,000 ($750,000 reserve) or less, and 12% reserve ($1,200,000 for each $10 million) on amounts in excess of $25,000,000, as to which larger amounts the Federal Reserve Board is empowered, in its discretion, to adjust the percentage of required reserve to a rate between 8% and 14%. Under 12 U.S.C. § 461(c)(1)(A) and (B) such reserves may be kept in the form of vault cash except to the extent that such reserves are kept in accounts in a Federal Reserve Bank or other Federally established financial entity listed in ¶ (B) for the provision of ready cash to maintain liquidity of each such insured bank. The legal and factual basis of such federal banking requirement is that every depositor, on any and every banking day, has the absolute right to receive such depositor's entire account balance from every such bank upon demand, being the total amount of the debt owed by the bank, as debtor, to its depositor, as creditor.

4. Further as a matter of law, a trust company which is not a bank, such as Petitioner, holds no deposits subject to withdrawal upon demand, has never had a depositor, has never been insured nor been legally insurable under the Federal Deposits Insurance Act, is not authorized to engage in business as a bank, has never been so authorized, and has never engaged in the banking business. All moneys it controls in trust funds, the subject-matter of the Respondent Commissioner's concern, are held under trust indentures, mostly bond resolutions on the basis of which bonds have been issued by bond issuers and sold to the public, and no part of such money is subject to a right to demand withdrawal, except as provided by each bond resolution or indenture. Such bond resolutions invariably provide for payments of principal and/or interest instalments to each bondholder semi-annually, and as to most of them, Petitioner holds the bond sinking fund (or similar security fund, hereinafter called "sinking fund") in trust, to be held until all bonds in the issue have been redeemed, as security for the benefit of bondholders, such funds totaling in the millions of dollars and not to be disbursed (except upon the call of bonds for payment or for a refunding issue), but are to be held over a lengthy periods such as 10 to 40 years. On bond issues under which Petitioner acts as Trustee, the bond-debtor is required, each year, to pay to Petitioner, usually in instalments, the full total amount of all principal and interest instalments (hereinafter called "contributions") required to be disbursed that year to bondholders, in interest alone at the end of the half-year and principal and interest at the end of each bond year. Therefore, except in case of the bond-issuer's default, no part of the "sinking fund" is disbursed to bondholders until maturity of all bonds in the issue. On some bond issues, Petitioner acts only as Transfer Agent, transferring ownership of bonds, and as Paying Agent on issues on which it is not trustee, it customarily receives the semi-annual interest or principal and interest totals from the bond debtor, often by wire transfer, only within days before the date of that issue's required semi-annual disbursement. In the performance of its trustee duties, Petitioner never receives cash in its function of holding and managing trust funds, but receives wire transfers or checks and other such negotiable instruments, and all the moneys it holds in trust are held in its fiduciary accounts in banks insured by the Federal Deposit Insurance Corporation unless and until disbursed. Inasmuch as Petitioner and every other such non-bank trust company holds **no funds** payable upon demand, there is no need for reserves in the operation of a trust company as distinguished from the banking business, and there is no law—state or federal—imposing upon non-banking trust companies the requirements for cash reserves which **must** be required of banks, by economics if not by law.

5. In every action by Respondent Commissioner of which Petitioner complains, the said Respondent Commissioner has claimed to act under the authority of statutes that purport to empower him to take disruptive action only in regard to **banks,** with no language purporting to grant him any such authority over non-banking trust companies, either by the Tennessee Banking Act, T.C.A. § 45-1-101, *et seq.*, or by amendments thereof by the aforesaid Chapter 112, Public Acts of 1999, all provisions of which Public Act have been codified since 2000. Such powers specifically granted to Respondent Commissioner to be exercised over **banks** alone include the powers to issue orders for the protection of earnings and the interests of **depositors** of "state banks" under T.C.A. § 45-1-107(a)(5), to remove officers of a "state bank" and impose stated requirements upon a "state bank" under T.C.A. § 45-1-107(b) and (e), to take possession of a "state bank," to assume such bank's powers of management and control, and possibly later conclude to liquidate the "state bank" as set out in T.C.A. § 45-2-1502, and the power subsequently to determine, *subject to prior court approval,* to liquidate such a "state bank," the power to appoint a receiver for a "state bank" in T.C.A. § 45-2-1502(b)(2), and the power to make orders for the protection or governance of banks under T.C.A. § 45-2-107(a) and (e).

6. In addition to the foregoing and other powers vested in the Respondent Commissioner to take such action against **banks,** there are other statutes in the Tennessee Banking Act that by their specific terms apply directly to and govern banks, their powers and their authorized or prohibited actions, and these include T.C.A. § 45-2-1001, prohibiting every state bank from acting as a fiduciary unless such state bank has been authorized to act as a fiduciary, T.C.A. § 45-2-704 enacting rules on ownership of deposits in banks, and T.C.A. § 45-2-1501, authorizing a bank to voluntarily liquidate under stated conditions. However, most restrictive rules applicable to banks are part of the Federal statutory scheme regulating all banks whose deposits are insured by the Federal Deposit Insurance Corporation, as alleged (¶ 3, *supra).* Certain additional powers and privileges are extended to only those state banks that are authorized to exercise fiduciary powers by the Tennessee Banking Act, T.C.A. §§ 42-2-1002–1006.

7. The Tennessee Banking Act has other provisions applicable only to trust companies that are not banks, including T.C.A. § 45-2-1012, requiring each such company to maintain an office in the state and T.C.A. § 45-2-1018, forbidding each company to engage in commerce or other business unrelated to its trust business. As hereinbefore indicated *(supra,* ¶ 2), Petitioner has been

authorized to engage in business as a trust company by its corporate charter since its issuance on November 20, 1975, it has never engaged in or been authorized to engage in the banking business by holding deposits, and this status was acknowledged by Respondent Commissioner when he began exercising the bank regulatory powers over Petitioner (of which Petitioner complains, *supra,* ¶ 1) by a press release, which he caused to be published on the official internet web site of the Tennessee Department of Financial Institutions, http://www.state.tn.us/financialinst to be a "non-deposit institution," a copy of which press release is attached hereto as **Exhibit G.** Pursuant to the amendatory enactment of Chapter 112, Public Acts of 1999, T.C.A. § 45-1-124, forbids any company which was not engaged in business as a trust company on July 1, 1999, whether its powers derived from a corporate charter grant by the State or "charter" previously granted by the Commissioner of Financial Institutions, to act as a trust company in the future except by applying to and receiving authority from the said Commissioner, T.C.A. § 45-1-124(e) and (g). However, companies such as Petitioner, which were engaged in business under charter provisions on July 1, 1999, are granted the statutory right to perpetually continue engaging in such business without submitting any such application to the said Commissioner, T.C.A. § 45-1-124(f).

8. Petitioner, complaining of the illegality of the Respondent Commissioner's exercise against it, as a trust company not in the banking business, of statutory powers applicable only to banks, avers that Respondent is chargeable with notice that long before the amendments achieved by Chapter 112, Public Acts of 1999, it had been authoritatively determined that statutes merely subjecting non-banking companies to the Banking Act, and to the policing powers of the Department of Financial Institutions, do not empower the Commissioner of said Department to exercise against such non-banking institutions any statutory powers granted to him over banks, *Madison Loan & Thrift Co. v. Neff, Commissioner of Insurance and Leech, Attorney-General of Tennessee,* 648 S.W.2d 655 (Tenn.Appl, M.S., 1982).

9. The Tennessee Banking Act, as amended by the aforesaid Public Chapter 112, does not state any authorization for the Respondent to exercise against any non-bank trust company **any** bank regulatory powers with the single exception of the authority of examination, T.C.A. § 124(h), which provides in part as to "state trust companies operating on July 1, 1999," that " the commissioner may conduct examinations at such company's expense, . . ." He is given the general power to enforce applicable laws against trust companies, including both statutes applicable by their

terms only to trust companies *(supra,* ¶ 7), and statutes in the Tennessee Banking Act concerning fiduciary functions which, by their explicit terms, are applicable both to trust companies and to banks authorized to exercise fiduciary powers, T.C.A. §§ 45-2-1002–1006. For application of these sections alone, "bank" includes "trust companies" under T.C.A. § 45-2-1001(c)(1), which provides, in part, that "A bank authorized to act as a fiduciary (which term includes a trust company, for the purposes of this section and §§ 45-2-1002–45-2-1006) . . ." However, no statute provides that the term "bank" includes "trust company" with reference to any other provisions of the Tennessee Banking Act (T.C.A. Title 45, Parts 1 and 2). Hence, no law authorizes the Respondent Commissioner to exercise against any non-banking trust company such bank regulatory powers as issuing a cease-and-desist order, requiring it to conform to banking practices or increase its capital, or make any orders seizing its properties, removing its corporate directors and officers from office, discharging its employees, and taking any action to liquidate such non-depository companies. In so acting as herein alleged *(supra,* ¶ 1), the said Respondent acted, and continues to act, illegally, without any statutory grant of authority, and wholly in excess of his jurisdiction.

10. In addition to the Commissioner's lack of statutory authority to accomplish, as hereinbefore alleged, the charging actions, seizures, *de facto* removal of Respondent Company's officers and directors and termination of the employment of its employees, assumption of control of the assets it holds in trust in the possession of banks authorized to hold such assets, and *de facto* seizure and exercise of Respondent Company's powers and duties as Trustee and Paying Agents under all the bond instruments under which it has been so appointed, the Commissioner's actions and attempted exercise of jurisdiction under the Administrative Procedure Act, T.C.A. §§ 4-5-101, *et seq.,* his actions in such course of official actions which began with issuance of the said "Notice of Charges and Opportunity for Subsequent Hearing" on May 3, 2004, are arbitrary, unauthorized by law, and in excess of the powers vested in him by law, for the following additional reasons, which preclude any asserted "construction" that statutes enunciating empowerment to act in regard to state banks may empower such actions in regard to any trust company which is not a bank:

(a) To the extent that legislation may be contended to empower the Commissioner to take such actions as assuming Respondent Company's contractual obligations and rights to control all trust funds in its bank accounts by virtue of its status as Trustee and Paying Agent, the State of Tennessee (including its statutes and regulations) is constitutionally

prohibited from taking such actions by prohibitions against it impairing the obligations of contract, Constitution of Tennessee, Art. I, § 20 and Article XI, § 16, and the Constitution of the United States, Art I, § 10.

(b) The Commissioner and the State of Tennessee are prohibited from seizing the property of Respondent Company, and the property of thousands of bond-holders and bond issuers which Respondent Company holds in trust, without just compensation, in violation of the Constitution of Tennessee, Art. I, § 8 and Art. XI, § 16, and the Constitution of the United States, Fifth Amendment and Fourteenth Amendment, § 1.

(c) Apart from consents or waivers that (insofar as Petitioners know) may have been required of state banks, as far as trust companies and other corporations and private citizens are concerned, the power to issue orders to specific persons or corporations requiring the obedience of laws, the power to impose receiverships as a means of enforcing laws for the protection of the public and individuals, is and has always been among the judicial powers vested in the Courts of Tennessee, and it is forbidden that any statute vest, or be construed as vesting any part of such judicial power in any member of the Legislative or Executive Departments of the State of Tennessee by the Constitution of Tennessee, Art. II, § 2, which provides: "No person or persons belonging to one of these departments [Legislative, Executive and Judicial, by Art. II, § 1] shall exercise any of the powers belonging to either of the others, *except in cases herein directed or permitted.*" (Italics added). There is no other provision of the Constitution of Tennessee either directing or permitting such judicial powers to be exercised by the Commissioner or by the head of any other Executive Department of the State of Tennessee. Hence the Commissioner's purported subsequent appointment of a receiver is void, and actions by the Commissioner, his appointed "Receiver," and its representatives pursuant thereto, including intrusion into control of the trust funds held by Respondent Company in its bank accounts, are without legal authority.

(d) To the extent that the Commissioner might otherwise be authorized to conduct administrative hearings and make administrative determinations, subject to judicial review, under the Administrative Procedure Act, in this case, the subject-matter involves his alleged abuse of his own powers and the exercise of powers in excess of those granted him, and as a principle of Due Process of Law under the above-cited provisions of the Constitutions of

the United States and the State of Tennessee, he may not properly sit in judgment on his own past actions and conduct in office under the said Act.

11. In Respondent Commissioner's Notice of Charges, **Exhibit A,** as alleged above, he asserted he was acting on the basis of enforcement powers he is authorized by T.C.A. § 45-1-107, to exercise in regard to state banks and/or for the protection of depositors in such bank, and accordingly gave notice that interested parties could be heard in opposition under the Administrative Procedure Act by filing response with said Respondent within 30 days. For the reasons already alleged, by virtue of the fact that Petitioner Sentinel is not a bank and has never engaged in the banking business, such charge was beyond Respondent's power to make because not authorized by T.C.A. § 45-1-107, and proceeding under the Administrative Procedure Act was not authorized because Respondent merely claimed such powers, which would have been procedurally subject to the Administrative Procedure Act under T.C.A. § 45-1-108(a) had Respondent actually been authorized to act—instead of mistakenly claiming authority to act under that statute—but not being so empowered, his actions in making the charges were beyond his authority. Hence, for the protection of its interests against default, Respondent claimed the right to specially appear and filed answer on June 2, 2004, denying all authority and jurisdiction to proceed under the Administrative Procedure Act, a copy of which is attached hereto as **Exhibit H.**

12. Every other order issued by the Respondent Commissioner which actually interferes with and makes impossible Petitioner Sentinel's conduct of its business and performance of its duties under bond indentures, as listed above *(supra,* ¶ 1(b)-(e)), is self-executing or placed into effect by enforcement activity of personnel under Respondent Commissioner's direction, each causes continuing and ever-increasing damage, and each states that it is reviewable upon writ of *certiorari* in this Court. Yet each such order is subject to nullification by decision of the Respondent Commissioner at any time, and is subject to invalidation by this Court's common-law writ of *certiorari* under T.C.A. § 27-8-101, which Petitioners insist is the appropriate remedy, or if the same be inapplicable, under either T.C.A. §§ 28-8-102, *et seq.,* or under T.C.A. §§ 27-9-101, *et seq.* Each such order constitutes a continuing active violation of Petitioner's legal and constitutional rights for the reasons already alleged and those alleged below.

Allegations Relating Also to the Urgent Need for *Supersedeas:*

13. Petitioner's customary mode of conducting its business has long been that all funds it receives as a fiduciary under different bond issues are deposited in its correspondent F.D.I.C.-insured Bank account to be held in its name as a fiduciary, with all securities it purchases for the benefit of bond issuers and bondholders being held in Petitioner's name as a trustee, but on Petitioner's own books, all moneys and securities (both those received and those paid or sold) are attributed to the issuer for whose bondholders the funds and securities are held to secure payment. The bonds so secured are tax-exempt, many are municipal bonds, but many were tax-exempt bonds secured only by the properties and business income flow of particular local projects, as to which the local governmental issuers were mere conduits for achieving the tax-exempt status, and those bonds were not issued under the pledge of governmental credit or other governmental guaranty.

14. Many of the entities receiving bond sales proceeds and liable for repayment under their bond resolutions or indentures were hospitals and other health-care institutions and as a consequence of the Congressional enactment of the Balanced Budget Act of 1997, they suffered such prolonged delay in receiving compensation for Medicare and Medicaid services furnished that they were unable to continue their operations because of the inadequacy of cash flow, due to the diminished rate of cash receipts and the lack of sufficient capital. As a consequence, mostly during the period of 1999–2000, about 63 such health-care related companies went into default on their bonds under which Petitioner was trustee, compelling Petitioner to perform its duties, under each such bond resolution or indenture, to pursue bonded debtors and liquidate their assets subject to bond-indenture liens for the benefit of bondholders. Moneys from what Respondent Commissioner has labeled the "pooled bond funds" were used in carrying out Sentinel's liquidation obligations, including the payment of attorney fees, other litigation expenses, and in some cases, moneys required to be paid by orders of courts in some of the many litigations occurring as a result of the defaults. Of all defaulting bond issues (as of December 31, 2003), 50 have been closed out, with 13 remaining issues still subject to the completion of Sentinel's liquidation obligations, and with considerable litigation still pending, all being handled by attorneys of Sentinel's choice until Respondent Commissioner's actions of seizure and other actions in excess of his authority effectively brought an end to Sentinel's power to pursue such remedies. Petitioner alleges that to an absolute certainty, the **only possible way** the remaining bondholders can be paid the fullest amount possible is by pursuing such liquidation activity to achieve the greatest possible monetary recovery, and by Sentinel itself, from its assets and its past and future income, paying any remaining deficiency to the extent

of its liability, if any, that may be imposed under the laws governing fiduciary obligations. Except by the performance of this liquidation labor, it is not possible to maximize bondholder recovery or to determine the extent of monetary losses to bondholders under each bond issue. But to the extent of recovery, Petitioner Sentinel Trust Company's fee and liquidation expense entitlement has priority of the rights of every bond holder under every bond issue.

15. In making all such expenditures to carry out its security-enforcement obligations to bondholders, Sentinel meticulously assigned all cash held, receipts and expenditures to the bonded debtor to which they were related, and subsequently each properly reapportioned to individual bond issues, inasmuch as some issuers had a number of different bond issues secured by different properties. In making the necessary expenditures in relation to each bonded debtor, as later reassigned for each bond issue, whenever expenditures exceeded the amount of cash Petitioner held on its books in relation to each such bond debtor and bond issue, Petitioner classified the excessive payments as an "overdraft," the same classification used by banks. All of Sentinel's fee receipts and all its fee entitlements will be available for it to use to cover such overdrafts in each bond issue, without any restriction to the particular bond issues from which such fee payments and entitlements shall have arisen.

16. In Respondent Commissioner's Notice of Charges, the cumulative amounts Sentinel classified, perhaps colloquially, as "overdrafts" in a constantly-changing total of approximately $7,500,000.00, more or less, was treated in such Notice of Charges as the amount of money expended from the "pooled trust funds," that is, as cash withdrawals. This is inaccurate. Such amount instead is the cumulative total of all **payment obligations** owed on all the defaulted bond issues, and such total far exceeds the amount of money spent from the said funds. With the first month's overdraft the excessive money spent reduced the total cash in the "pooled trust funds" by that exact amount, but it did not reduce the amount of money any individual bond fund was entitled to have segregated and to receive from the pooled funds in the event of the need for cash withdrawal. Each month, each such bond fund having a cash balance entitlement was at all times credited with additional interest at the average rate earned that month by Sun Trust Bank's payment of interest on the total cash funds held..The actual receipt of such cash and accrued interest credited to each non-default issue for withdrawal pursuant to the terms of the indenture governing each such bond issue is subject to the availability of sufficient cash in the "pooled trust fund" but as alleged above *(supra,*

¶ 4), such funds are not subject to any right to demand instant withdrawal, but are held for periods of decades under bond indenture provisions. Hence, no risk of loss is immediate, but the possibility of risk is indeterminable until the completion of all required security enforcement litigation and procedures.

17. As against the cash in the "pooled trust fund," the "overdraft" balance on each over-spent fund an added charge of 1.5% each month, so that an initial overdraft of $100,000 one month would automatically become $101,500.00 the end of the following month. There is attached hereto as **Exhibit I,** a copy of the most recent readoption of Sentinel's schedule of fees and charges pertaining to defaulted bond issues, but it has been little changed since late in the 1980s, when the 1½% monthly add-on charge was adopted for overdrafted disbursements, and the main and most recent change was the adoption of an additional default fee of $25,000.00 adopted in the year 2000 with the commencement of large numbers of acts of default in numerous different issues. Including the monthly rate in determining the overdraft **obligation,** for the five-year, or 60-month period of April, 1999 to April, 2004, application of the universally-known compounding formula would make an initial overdraft charge of $500,000 grow to that amount multiplied by $(1.015)^{60}$, or $1,221,609.89, a **charge** much greater than the overdraft. A $500,000.00 overdraft for a 2-year period would grow to a total **charge** of $717,751.41. It is impossible, without extended labor, to compute the total amount by which each bond fund's charges exceed withdrawn amounts by such mathematical methods, and such effort would have no purpose, but such cumulative "overdraft" balance is far greater than the money utilized from the pooled fund to carry out Petitioner's fiduciary responsibilities. After liquidation of defaulted bond securities, if the collected portions of overdraft balances, including the additional 1½% monthly compounded charges on **some of** the different funds should produce cash in excess of the moneys actually spent from the pooled funds, the excessive receipts would not constitute a fee to Sentinel, but extra profits to be prorated among the bond funds never in default. It is necessarily true that the overdrawn money is only a fraction, and perhaps a small fraction of the entire approximately $7.5 million overdraft charge against defaulted bond debtors.

18. Because there is a deficiency in cash in some unknown amount, when considering only the separate bond accounts on Sentinel's books relating to fiduciary accounts, there is a practical need for a cash fund to offset any deficiency of actual cash, but nothing even similar to cash reserves

required of banks and other depository institutions subject to the right of demand for instant withdrawal of all balances owed to every depositor. Sentinel earned fees under its contracts regarding every bond issue not in default, and when the excessive withdrawals became necessary, while periodic checks were issued to Sentinel, it retained some of them uncashed so that for each such uncashed check, the cash remained in the "pooled trust fund" as security against inadequate liquidity. On the date the Respondent Commissioner seized possession of Sentinel properties, the total of such uncashed checks held by Sentinel, to assure adequate liquidity, was approximately $2,600,000.00. In addition, since the commencement of the problems caused by the defaults on 63 bond issues, whose causation was not the result of any action of Petitioner, Sentinel has withheld posting additional fees it is entitled to post and pay to itself, and the unposted fee entitlement totals an estimated amount of about $3,500,000.00. Hence, Petitioner's present cash entitlement from the pooled funds totals over $6,000,000.00, subject to cash availability. For the foregoing reasons, the sensible remedy for the dilemma caused by the defaults of 63 bond-issuers is to continue vigorously pursuing collection efforts to liquidate assets subject to the bond liens held for the protection of bondholders, and as well for Sentinel, which has priority over the bondholders for fiduciary expenses and fees, and then if there remains a deficiency in **cash,** for Sentinel to then pay that deficiency to the extent of its liability therefor.

19. As shown above, the fiduciary accounts held by Sentinel are not threatened by any present liquidity problem, the injection of an additional $2,000,000.00 into Sentinel's capital would have no beneficial effect, because Sentinel's own money is kept in a different bank, and its moneys may not be deposited into its fiduciary account because it is legally prohibited from mingling its own assets with trust assets, T.C.A. § 45-2-1003(a). With every bond issuer obligated each year to make all cash contributions (as defined, ¶ 4) to cover the full amount of its total payment obligations to all the issue's bondholders for that year, there has never been any failure or even any threatened failure of Sentinel to pay all amounts due every bond holder under every bond issue, except for those caused by acts of default caused by the bond-issuer itself.

20. The Commissioner's actions herein had unwarranted but devastating effects upon Sentinel as well as upon the non-defaulted bond issuers and bondholders thereof. Sentinel's ratings by rating services such as Dun & Bradstreet were drastically reduced immediately, its dispossessed officers immediately lost their ability to contact and receive contact from most customers they

served, and lost Sentinel's considerable ability to continue its constructive works to acquire and serve more issuers, so that profits would continue to offset the loss balances, if any, that may remain after all security-liquidation work shall have been completed. At the instant of closing, its newly-imposed inability to be recognized as a trustee, registrar and paying agent, caused it to lose contracts already obtained to serve on three Tennessee municipal bond issues, causing a loss of approximately $92,250.00 in fee income [**Attachment #1**—Lancaster Aff]; such is an approximation solely because on such bond issues, the exact amount of the issue cannot be determined until the day of closing. Semi-Annual payments to bondholders on a number of municipal bond issues were scheduled for June 1, June 15, and July 1, 2004; in many such issues, the issuers had paid all contributions then required for such upcoming payments except for contributions not due from them until after the seizure date, May 18, 2004, and under the terms of the Commissioner's order and related notice (**Ex. D,** last 2 pp.), moneys of such issuers previously paid in were to be sealed off from use, so that the remaining contributions, even if paid as due, would be inadequate. Such action by the Commissioner is bound to have caused such issues to go into default status on the aforesaid payment dates unless the issuing municipalities were able to raise and pay in the full amount of the semi-annual payments due their bondholders, which would have constituted considerable duplicate payments. Hence, such actions by the Commissioner is bound to have caused defaults on some bond issues whose issuers did not fail to perform any obligation undertaken. The Commissioner publicized the details of his accusations against Sentinel to the entire financial community of this country by immediately posting copies of all charges and orders on his aforesaid web site *(supra,* ¶ 7), and this was followed promptly by some individuals with a long history of close connections with Sentinel beginning to fail to accept or fail to return telephone calls from Sentinel's officers, who needed such contacts for legitimate defensive information-gathering purposes. Before the Commissioner's attack and national publication thereof, Sentinel and its president and majority stock-holder, the Petitioner Bates, deserved and enjoyed the highest reputation for integrity and insistence upon doing everything properly in its fiduciary functions [**Attachment #2**—Miller Affidavit].

21. Before the Commissioner's seizure actions *(supra,* ¶ 1), Sentinel had competent counsel pursuing claim enforcement activities, and the Commissioner's inattention to authorizing continuation of those efforts had the effect of interfering with the prompt efficient pursuit of such litigation which has a reasonable probability of collecting over $1,000,000.00 for the benefit of bondholders [**Attachment #3**—Van Kesterin Affidavit]. Upon information and belief, it can be

shown, with the aid of compulsory judicial process, that termination of an attorney's representational agency by authority of the Commissioner retarded settlement of a claim which would have fairly rapidly produced the disbursement of about $900,000.00 from a fiduciary in possession, which would have produced about $600,000.00 in trust funds Sentinel is entitled to receive **[Attachment #4**—Kilgore Affidavit], as expected to be shown by first-hand knowledge **[Attachment #8,** Mary Neil Price Affidavit, if received]. Sentinel reasonably expects a substantial share of some $2.8 million (and post 1997 earnings thereon) impounded and held by the Securities and Exchange Commission pending litigation in U. S. District Court in Nashville. Further on information and belief **[Attachment #4**—Kilgore Affidavit], it can be established through knowledge of other counsel that in years-long litigation, Sentinel recovered $1.2 million, exceeding litigation-expense overdrafts, was prepared by new counsel, with considerable knowledge of the underlying dispute, to continue prosecuting Sentinel's recovery efforts in the said complex litigation pending in the U. S. District Court for the Middle District of Tennessee, as expected to be shown by first-hand knowledge **[Attachment #9,** Joseph R. Prochaska Affidavit, if received].

22. Respondent Commissioner, by virtue alone of his exercise of his claimed power to impose a receivership, claims to have the exclusive right to control access to all privileged communications between Sentinel and attorneys and accountants formerly serving it **[Attachment #4**—Kilgore Affidavit]. As a matter of law, Petitioner has been advised and believes, upon such advice and belief, and avers that its Board of Directors have the exclusive right to control access to information known to professionals who have formerly served it for substantial compensation, and further avers that even the imposition of a proper and lawfully-imposed receivership over mere property interests and investments would give such a receiver no ownership over such personal rights as control of the protection of past communications whose confidentiality is recognized by law; that the most powerful receivership-type office in the United States is that of trustee in bankruptcy, and it was solely the broad sweep of those statutory rights and powers that, in the rationale of the United States Supreme Court, led that Court to conclude that such a trustee succeeded to ownership of the bankrupt debtor's right to control access to his past privileged attorney-client communications in *Commodity Futures Training Corp. v. Weintraub,* 471 U.S. 343; 105 S.Ct. 1986; 85 L.Ed.2d 372 (1985). It is alleged upon information and belief that, with the aid of judicial process, such information of probable great value to Petitioner in defending itself against the Commissioner's attacks upon it exists in testimonial information available from attorneys and accountants who

formerly served Sentinel Trust [**Attachment #4**—Kilgore Aff., **Attachment #5**—Bates Aff.].

23. At the time the Commissioner seized Sentinel's properties, all banks and securities-related businesses treated the seizure and receivership as valid, probably because of the respect due the Respondent's office and the powers vested in it over the banking industry in Tennessee, and such institutions accepted the Commissioner's insistence that he alone had the lawful right to control all such bank accounts and ongoing relationships between Sentinel and the national banking and securities interests. Hence, the Commissioner had total *de facto* control of all of Sentinel's bank accounts, including the fiduciary accounts in which it held millions of dollars in trust. Sentinel's own bank account funds owned by it totaled about $53,000.00, which the Commissioner, upon achievement of his seizure, had the total *de facto* power to exhaust in actions by his appointed receiver in paying all receivership costs, including employee compensation and costs for services of professionals retained by such Receiver. In exercising his statutory power to take possession of any **state bank** when grounds therefor exist, T.C.A. § 45-2-1502 does not require the Commissioner to commence **any litigation,** nor does any other statute so require, but the Commissioner is required to file copies of various orders and notices with the chancery court with jurisdiction of the bank's situs and to obtain *ex parte* permission to carry out some of his decisions as set out in that statute, including sale of certain assets of such bank, such statute vesting in the chancellor a non-litigation function of the nature of an *ex officio* power. Inasmuch as the Commissioner is empowered to exhaust all cash funds owned by such a **bank** under his possession and control, particularly in anticipation of liquidation, by T.C.A. § 45-2-1502(f), Petitioner alleges upon information and belief, that the Commissioner may have exhausted all of Sentinel's cash deposited in its own bank account, because, having filed all copies with the Lewis County Chancery Court as required by said statute, the Receiver's counsel gave notice on June 25, 2004, that the Receiver was moving to file invoices, and requesting that the same be kept under seal, for services for herself, outside counsel, and third-party litigation support contractors. By seeking the writ of *certiorari,* Petitioner does not seek to interfere with the Chancellor's exercise of his discretion in granting or withholding approvals as may be sought by the Commissioner, but avers that the Commissioner's actions in dissipating Sentinel's assets is contrary to the obligation to protect the interests of bondholders.

24. By his actions in relation to both the receiver-appointment **(Ex. B)** and Notice of Liquidation **(Ex. E)**, the Commissioner has evinced a belief that the trust funds held in Sentinel's

fiduciary accounts in banks are funds subject to the Commissioner's powers of control, with bondholders being in the position of creditors, which belief is acknowledged in his seeking permission from the Lewis County Chancery Court to pay certain bondholders, as by his petition, a copy of which is attached hereto as **Exhibit J,** bearing a certificate of service dated June 18, 2004., citing T.C.A. § 45-2-1504(a). That statute requires, *inter alia,* the Commissioner to obtain the approval of the local chancery court for a list of decisions, including the compromise of certain creditor claims and sale of properties of a "state bank." Such extensive filings indicate a clear plan on the part of the Commissioner to act upon his view that trust funds are subject to distribution by him in the course of liquidating a "state bank," applying such to Petitioner, a state trust company. This is particularly threatening to bondholders, whose interests Sentinel is obligated to represent, because T.C.A. § 45-2-1504(f) and (h) respectively authorize the Commissioner to determine the validity of claims against a state bank and fix the priority of claims, with obligations undertaken by the Commissioner having the highest priority and the first $10.00 of each deposit having the fourth highest priority. Such course of action on which the Commissioner has embarked is entirely unauthorized. As applied to a bank, as the statute provides, the mass of co-mingled funds derived from deposits and earnings thereon are the property of the bank, acquired by borrowing, and the depositors are creditors based upon the act of depositing which creates the debtor-creditor relation under T.C.A. § 45-3-103(9) (quoted *supra,* ¶ 3). The trust funds are not the property of Petitioner Sentinel Trust Company, which is merely the trustee holding bare legal title with such powers as are granted by each trust indenture, but such funds are wholly the property of the bondholders, and the diversion of such funds by the Commissioner is not authorized by any law. As to banks authorized to exercise fiduciary powers, T.C.A. § 45-2-1504(c) requires the Commisioner to "settle its fiduciary accounts" and authorizes him then to transfer all fiduciary accounts "to another qualified corporate fiduciary . . ." Nothing in the Tennessee Banking Act authorizes the Commissioner to convert funds held in trust, or to spend any part of them for administrative or any other purposes.

25. Upon information and belief, Petitioner alleges the Commissioner is causing his appointed Receiver to perform the special functions of Petitioner as a Trustee and in the related functions of Bond Registrar and Paying Agent. The Commissioner holds no such powers. The right to remove the Trustee and appoint a new Trustee is vested by each bond resolution in the body of bondholders, or sometimes the bond issuer. The state's power to remove a trustee and to appoint a substitute trustee to exercise the trustee's powers is solely a judicial power, and constitutionally may

not be exercised by any executive officer of the state, as shown above *(supra,* ¶ 10(c)).

26. The Commissioner's entire course of action in seizing Sentinel's private property and assuming its corporate powers is premised upon the charge that Sentinel abused its fiduciary powers by using pooled trust fund moneys to carry out its fiduciary obligations of liquidating security held by it as an indenture trustee. The substantive law on fiduciaries abusing their powers is not within the Commissioner's enforcement jurisdiction; contrary to his assumption of power, whether the fiduciary be a trust company or a bank vested with fiduciary powers, the power to determine whether such abuses have occurred and to remedy them is a judicial power, vested solely in the courts by T.C.A. § 35-3-117, the Commissioner is given no regulatory power over conduct governed by that statute, and the powers therein providing for determining if a fiduciary abuse has occurred and remedying the same, in the precise manner provided thereby, is not vested in and may not be exercised by the Commissioner or any other executive officer of the state, as shown above *(supra,* ¶ 10(c)).

27. The Department of Financial Institutions' examination of Sentinel's operations was begun in May, 2003, under the Respondent Commissioner's immediate predecessor in office, the examiners were in Sentinel's office as often as they desired each week or month, were given full cooperation by Sentinel's officers and employees, and never made the slightest comment that its mode of borrowing money to carry out its obligations under defaulted bond issues was illegal or disapproved. In setting up and operating such liquidation work and litigation, Petitioner was advised by a premier Nashville law firm, Waller, Lansden, Dortch & Davis (hereinafter, Waller-Lansden), a firm of high professional reputation, standing and abilities. Waller-Lansden knew of and approved the mode of using money from the "pooled trust funds," and knew that the method was followed by the trust departments of banks vested with fiduciary powers, including the practice of allowing and seeking to recover overdrafts on particular bond issues. Petitioner avers that the propriety of its practices in that regard were based on Waller-Lansden's advice and were wholly justifiable because:

(a) On information and belief (**Attachment #4**—Kilgore Aff.), with the availability of judicial compulsion, it alleges that testimony from Waller-Lansden attorneys would corroborate the belief of the subscribing affiant hereto that such was the studied advice of Waller-Lansden, not merely an attorney's offhand assumption, and may also reveal whether "information" may have been communicated to Waller-Lansden attorneys on the occasion

of their meeting with Respondent Commissioner as alleged in his Notice of Charges (**Ex. A**) to cause Waller-Lansden, previously totally supportive of Sentinel and its President Bates, to suddenly resign as Sentinel's leading counsel.

(b) Corroborative testimony of Waller-Lansden's standing upon its advice should be available from Sentinel's Vice-President Paul Williams, now employed in an apparently executive capacity by the Commissioner's Receiver (**Attachment 6**—Second Miller Aff., if received), who authored a memo, in an e-mail transmission to Affiant Bates (**Exhibit K** hereto) formalizing the policy of advancing asset-recovery costs from the "pooled trust funds"and indicating an intent to submit the same to Waller-Lansden for legal review.

(c) Petitioner has been advised and believes that there was sound legal basis for Waller-Lansden to opine that the moneys could be borrowed lawfully for that purpose from the "pooled trust funds" because one of the statutes in which the word "banks" specifically includes "trust companies" *(supra,* ¶ 9), T.C.A. § 45-2-1003(c) provides that such funds "may be used in the conduct of its business . . ." by the said bank under stated conditions.

28. Petitioner further alleges that it has been advised and believes that even if Waller-Lansden's advice was mistaken and such practice of utilizing "pooled trust funds" for the purpose of carrying out its fiduciary obligations, as condemned by Respondent Commissioner, was inappropriate, the determination of such an issue is not with the Commissioner's administrative powers *(supra,* ¶ 26), the probable remedy to be imposed by a Chancery Court under T.C.A. § 35-3-117(i), would be to "require a distribution from the trust to the beneficiary in an amount that the court determines will restore the beneficiary, in whole or in part, to the beneficiary's appropriate position, . . ." upon determination "that the abuse of discretion has resulted in no distribution to a beneficiary or a distribution that is too small, . . . taking into account all prior distributions to the beneficiary." Hence, there should be no judicial sanction imposed because Petitioner's use of such moneys has not caused, and **could not cause** *(supra,* ¶¶ 16-18), any delay or reduction in bondholder principal and/or interest payments.

29. The Commissioner's Receiver, in *de facto* control of its fiduciary bank accounts, has, by decision made by the aforesaid Paul Williams, refused to release $300,000.00 to a bond issuer which is paying off its bonds, without possible legitimate reason to retain those funds, and without

even any reason, except to use them to pay receivership expenses (**Attachment #6**—Second Miller Aff.).

30. For the foregoing reasons, because Sentinel's loss-recovery activities can most effectively be carried out through attorneys of its choice who are more familiar with pending litigations, because Sentinel's mode of operation was in fact in good faith, there is no basis for suspicion that it converted any moneys to its own use or that it disbursed any moneys except upon well-founded advice of eminently-qualified counsel, the interests of the bondholders will be better served by nullification of the Commissioner's orders by writ of *supersedeas* as soon as may be. This is true because, as herein shown, there is no danger to the non-defaulted bondholders interests, due to the factors of *(i)* the long holding duration of the "sinking funds" of each bond issue, *(ii)* the far greater probability that there will be no actual loss because of the combined effect of the Commissioner's exaggeration of the total amounts used from the "pooled trust funds" because of his lack of knowledge that the amounts Sentinel classified as "overdrafts" for collection purposes represented actual cash "borrowing" greatly increased by the 1½% monthly compounding default charge, *(iii)* the protective effects of Sentinel being restored to the position where it can receive additional fees which will increase the degree of bondholder security against possible loss, and because *(iv)* any accurate computation of overspending will be offset by Sentinel's present entitlement of past-earned and unpaid fees exceeding $6,000,000.00, which would be increased by Sentinel's resumption of earnings for its services on all undefaulted bond issues of about 100 issuers.

WHEREFORE, Petitioner Sentinel Trust Company prays:

1st: That the Court order issuance of the writ of *certiorari*, immediately and *ex parte,* as authorized by T.C.A. § 27-9-108, and as authorized by the common law as to the common law writ, to be served with a copy of this petition, as to all orders described in Paragraph 1, Sub-paragraphs (a), (b), (c), (d), and (e) of the complaint, leaving the *status quo* undisturbed unless and until issuance of *supersedeas*.

2nd: That the Court order the Respondent Commissioner to appear, at an early date, to show cause why the writ of *supersedeas* should not issue to restore Sentinel to the possession of its property and the trust funds entrusted to it, with the writ to be conditioned by such prohibitory and reporting requirements as the court may deem wise and as may be justified

by law, and that in such hearing, the Court restrict any required re-scheduling to as brief a time as practical.

THIS IS THE FIRST APPLICATION FOR EXTRAORDINARY RELIEF IN THIS CAUSE.

Respectfully submitted,

CARROL D. KILGORE (BPR #2544)
227 Second Avenue, North, Fourth Floor
Nashville, Tennessee 37201–5419

FIAT— TO THE CLERK & MASTER:

Issue the Writ as Prayed (with/without) Show Order on _____ at _____

_____
Chancellor

STATE of TENNESSEE)
)
COUNTY of DAVIDSON)

Personally appeared before me, a Notary Public for the above State and County, the undersigned Danny N. Bates, who, after being duly sworn according to law, deposed and said:

I am an adult resident of the State of Tennessee, residing in Hohenwald, Lewis County, Tennessee, am the controlling stockholder and President of Sentinel Trust Company, and as such make oath that the facts stated in the foregoing Petition for Certiorari in the Davidson County Chancery Court in *Sentinel Trust Company, et al., v. Lavender, Commissioner* are true of my own personal knowledge except for those I have been informed or advised, and accordingly believe to be true, being all allegations of matters of law, all facts specifically stated to be alleged upon information and belief. Further, as to facts sworn to be true in other affidavits attached or to be attached to the said complaint, statements of such affiants are a part of my information on the basis of which I sincerely believe such allegations to be true.

Danny N. Bates, Affiant

Sworn to and subscribed before me this 28th day of June, 2004.

Notary Public
My commission expires: 6-30-05

NOTARY PUBLIC AT LARGE DAVIDSON COUNTY, TENN.